

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7045

United States Court of Appeals
FOR THE SECOND CIRCUIT

MARGIE L. UPTON, individually and as Administratrix of
the Estate of LARRY L. UPTON, deceased, and as Mother
and Natural Guardian of KARI LEE UPTON, KIM MARIE
UPTON and JODI LYNN UPTON, Minors, *et al.*,

Plaintiffs-Appellants,

v.

THE DEPARTMENT OF CIVIL AVIATION
OF THE EMPIRE OF IRAN,

and

THE EMPIRE OF IRAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

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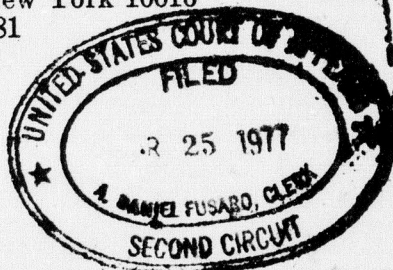


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Questions Presented

1. Where the summons and complaint was personally served upon Iran Air's New York manager and an employee at the Consulate General of Iran in New York and certified letters were mailed to the Minister of Justice in Iran and the Office of Legal Counsel at the Iranian Embassy in Washington, D.C., was service of process properly effected on the Empire of Iran and its Department of Civil Aviation?

2. Are the Empire of Iran and the Department of Civil Aviation of the Empire of Iran subject to the *in personam* jurisdiction of this Court through their ownership and complete control of Iran National Airlines Corporation which does business in New York?

Preliminary Statement

This action arises out of the deaths of two American citizens and residents, Larry L. Upton and Michael J. Nimtz (Upton and Nimtz), and the serious and permanent injury of a third American citizen, Alfred E. Caswell (Caswell), as a result of the collapse of the roof of the Main Hall of the Terminal Building at the Mehrabad International Airport, Tehran, Iran, on December 5, 1974 (A 5, 7 ¶¶ 4, 5, 6, 16; A 102 ¶ 2).¹ Plaintiffs-appellants in this action are Caswell, the wife and three infant children of decedent Upton and the wife and mother of decedent Nimtz (A 4, 6-8 ¶¶ 2, 8, 12, 13, 17; A 102 ¶ 3). Decedents Upton and Nimtz and plaintiff Caswell were all within the Terminal Building at the time of the accident waiting to board Iran National Airlines Corporation (Iran Air) flights to other countries (A 5 ¶ 5).²

Plaintiffs allege that the defendants-appellees the Empire of Iran (Empire) and the Department of Civil Aviation of the Empire of Iran (Department) caused the collapse of the roof as a result of their negligent operation, construction and maintenance of the building (A 5-7 ¶¶ 7, 11, 15; A 102 ¶ 4). Defendant Department has admitted it was responsible for the operation, administration and

¹ Numbers preceded by the letter "A" in parentheses refer to pages of the Joint Appendix.

² Decedent Upton and plaintiff Caswell had tickets on an Iran Air flight to Zurich, Switzerland with connecting flights to the United States. Decedent Nimtz was waiting to board an Iran Air flight to Frankfurt, Germany (A 182-85).

maintenance of the Mehrabad International Airport prior to and at the time of the roof's collapse (A 23 ¶ 6). Plaintiffs further allege that the defendants breached duties of care to the decedents and plaintiff Caswell arising from their status as airline passengers (A 5-7 ¶¶ 7, 11, 15; A 103 ¶ 5).

It should be noted at the outset that sovereign immunity is not an issue on this appeal (A 19). The sole issues are the propriety of service and whether defendants are subject to jurisdiction.

Facts

A. Service Upon Defendants Empire and Department.

Prior to the commencement of this action, plaintiffs' counsel telephoned the Consulate General of Iran in New York, asked for the Office of the Legal Counsel and inquired as to the person with whom a Summons and Complaint should be left (A 103 ¶ 6).³ Plaintiffs' counsel was given the name of a member of the Consulate General's staff, Ms. Pari Khorvash. In reliance on the information

³ The United States and defendant Empire are both parties to the Vienna Convention on Consular Relations, April 24, 1963, [1969], 21 U.S.T. 77, T.I.A.S. No. 6820 (Vienna Convention).

Article 5(j) of the Convention defines the functions of a consulate as including:

"(j) transmitting judicial and extra-judicial documents

Article 31(2) of the Convention requires that:

"2. The authorities of the receiving state shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending state (emphasis added)."

Plaintiffs contend that through Ms. Khorvash, as designee of the head of the consular post, they obtained permission for a deputy United States Marshal to leave copies of the Summons and Complaint with Ms. Khorvash.

obtained, the United States Marshal was directed to leave a copy of the Summons and Complaint with her. Accordingly, on July 8, 1976, a deputy United States Marshal delivered a copy of the plaintiffs' Summons and Complaint to Ms. Khorvash (A 103 ¶ 7, A 111).

On July 8, 1976, a deputy United States Marshal also personally served the defendants Empire and Department through service upon the manager of the Iran Air office at 345 Park Avenue, New York (A 104 ¶ 8; 112).

In addition, plaintiffs mailed copies of the Summons and Complaint by certified mail, return receipt requested, to other representatives of the defendants:

Mr. A. Moshaveghzadeh
Office of the Legal Counsel
The Imperial Embassy of Iran
3005 Massachusetts Avenue, N.W.
Washington, D.C. 20008;

and

The Honorable Sadeq Ahmadi
Minister of Justice
The Empire of Iran
Tehran, Iran
(A 11-12 ¶ 3; A 13-17).

Mr. Moshaveghzadeh acknowledged receipt of plaintiffs' Summons and Complaint and stated in a letter dated July 8, 1976 that a copy of the pleadings had already been forwarded to the Iranian Embassy's American counsel (A 18).

B. Presence in New York of Defendants Empire and Department Through Iran Air.

There exists a clear, direct relationship and an identity of interest among the defendants and Iran Air which has its principal United States office and does business in New York City. In documents filed with the Civil Aeronautics Board (C.A.B.) to obtain a foreign air carrier permit, Iran

Air admitted that it was an Iranian corporation wholly owned and controlled by defendant Empire and regulated by defendant Department.

"1. The full name and address of the applicant is Iran National Airlines Corporation, IRAN AIR Headquarters Building, Mehrabad Airport, Tehran, Iran. Applicant maintains an office in the United States at 345 Park Avenue, New York, New York.

2. Applicant is an Iranian corporation organized pursuant to the Law Concerning the Formation of the Iran National Airlines Corporation and Civil Aviation. No direct or indirect beneficial or non-beneficial interest in applicant is held by nationals of any government other than the Government of Iran. *Applicant is wholly owned and controlled by the Government of Iran.*

3. The name and official address of the competent air authority of applicant's country of citizenship having regulatory jurisdiction over the applicant is: Department General of Civil Aviation, Mehrabad Airport, Tehran, Iran (emphasis added)." (A 123.)

Defendants' total control of Iran Air is further established by other documents submitted by Iran Air to the C.A.B. Defendant Empire through its General Meeting and as sole stockholder determines general policy for Iran Air, elects the corporation's Board of Directors and approves its budget (A 142; A 165 Art. 8). All of the members of the Board of Directors of Iran Air either held positions with the defendant Empire or were described as a "formerly high-ranking government official" (A 130). One of Iran Air's four directors, Mr. Houshang Arbabi, was also the Administrator of Civil Aviation and the Deputy Minister of Roads (A 130). The Chairman of the Board of Iran Air was Gen. Mohammad Khatami, described as the Commander in Chief of the Imperial Iranian Air Force (A 130).

The Empire has conferred special benefits on Iran Air, such as fixing its fuel costs at 1957 rates (A 154 Art. 12) and granting it the exclusive right to operate a domestic and international airline (A 149 Art. 5). Defendant Empire also guaranteed all of Iran Air's loans from New York banks (totalling approximately 21 million dollars in September 1973) outstanding at the time the C.A.B. granted the airline permission to fly to the United States (A 143-44).

Prior Proceedings

Plaintiffs commenced this diversity action on June 30, 1976 (A 1, 3-9; A 10 ¶ 2). Defendants Empire and Department specially appeared and moved to "quash, vacate and set aside service of process" and to dismiss plaintiffs' action on the grounds that the court below lacked *in personam* jurisdiction over the defendants (A 19-20). Defendants reserved but did not raise the defense of sovereign immunity. In an opinion and order entered on December 17, 1976 and not yet published, the Court below granted defendants' motion and dismissed the Complaint (A 189-91). On January 17, 1977, plaintiffs filed their Notice of Appeal (A 192-93).

ARGUMENT

POINT I

Service of process in this action was proper under Rule 83 of the Federal Rules of Civil Procedure and Local Rule 15.

Service of process in the case at bar was designed to and did give defendants adequate notice of plaintiffs' claims. Indeed, the defendants never challenged the adequacy of the notice (A 18). Plaintiffs' methods of service

were consistent with due process, Rule 83⁴ of the Federal Rules of Civil Procedure and Local Court Rule 15.⁵ *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Republic International Corp. v. Amco Engineers, Inc.*, 516 F.2d 161 (9th Cir. 1975) and *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.D.C. 1973).

While no specific provision in the Federal Rules of Civil Procedure or New York state law provided for service of process upon a foreign government at the time this action was commenced,⁶ effective service was nevertheless obtained.

"[T]he fact that Rule 4 does not provide a method for service on respondent [Kingdom of Greece, Minis-

⁴"*Rules By District Courts*. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

⁵"*Procedure in Absence of Rule*. Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied." Rule 15 of the Civil Rules for the United States District Courts for the Southern and Eastern Districts of New York.

⁶On January 19, 1977, the Foreign Sovereign Immunities Act of 1976 (Sovereign Immunities Act), Pub. L. No. 94-583 [H.R. 11315] (Oct. 21, 1976); 90 Stat. 2891, took effect. The Sovereign Immunities Act is not applicable to this action, but plaintiffs' methods of service complied with certain provisions of the Act governing service. Sovereign Immunities Act § 4; 90 Stat. 2894-95.

try of Commerce] does not mean that no service could be effective." *Petrol Shipping, supra*, 360 F.2d at 108.

See also *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 363 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965):

"Though in most cases jurisdiction over a foreign sovereign is obtained in an *in rem* proceeding, there is no bar to the assertion of *in personam* jurisdiction."

In *Petrol Shipping, supra*, plaintiffs' ship was damaged in Greece. This Court approved service upon The Kingdom of Greece, Ministry of Commerce, by sending the Summons and Complaint by ordinary mail to the defendant's offices in Washington, D.C. and New York City.

Service in *Petrol Shipping* was approved under Rule 83, F.R.C.P., and Local Court Rule 15. Rule 83 confers upon this Court, as it did in *Petrol Shipping*, the power "to make and amend rules governing its practice not inconsistent with [the Federal Rules of Civil Procedure]." 360 F.2d at 108. The Court in *Petrol Shipping* also relied upon Local Court Rule 15 which permits the court below, in the absence of a specific statute or rule, to make procedural determinations on the basis of "parallels or analogies furnished by such statutes and rules." 360 F.2d at 108. In so holding, this Court made clear that the determination of a proper method of service in the absence of a federal or state rule was a matter for the federal courts.

"We deal here with a *casus omissus* both in the Federal Rules and in New York law. . . . [T]he fashioning of provisions with respect to service on foreign governments is a task peculiarly appropriate for federal courts." 360 F.2d at 109-10.

Republic International, supra, is in accord with *Petrol Shipping*. In *Republic International*, plaintiff sued the government of Uruguay for breach of contract. The District Court approved service upon the government through issuance of letters rogatory addressed to a Uruguayan court. Said court served the summons and complaint and made a return of service to the district court. In addition, an individual appointed by the district court effected personal service upon the defendant in Uruguay. Although plaintiff's action was dismissed on other grounds, the Court approved the method of service on the government pursuant to Rule 83:

"The action of the court below, in authorizing both the issuance of the letters rogatory to the Uruguayan court and the service by [the individual appointed by the court] at the special residence of appellant was a proper exercise of its power to regulate its practice under Rule 83. Service was, in both instances, reasonably calculated to give actual notice. Thus we hold that service of process was valid and that appellant's motion to quash was properly denied." 516 F.2d at 166.

Petrol Shipping was recently followed in *Renchard, supra*, a tort action for property damage. Service by registered mail upon the Embassy of Brazil in Washington, D.C. and by registered mail upon the Ministry of External Relations of the government of Brazil in Brazilia was held valid under Rule 83:

"Pursuant to the authority of Fed.R.Civ.P. 83 as explained in the *Petrol* decision, the court upholds the service of process upon the Government of Brazil by registered mail delivered to the Ministry of External Relations in Brazilia and by registered mail to the Embassy of Brazil in Washington, D.C. Both of these methods of service are reasonably calculated to pro-

vide adequate notice of the action, see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and registered mail is a method of service which is authorized in some circumstances by Fed.R.Civ.P. 4." 59 F.R.D. at 531-32.

See also *Kane v. Union of Soviet Socialist Republics*, 267 F.Supp. 709 (E.D. Pa. 1967), *aff'd*, 394 F.2d 131 (3d Cir. 1968), wherein personal service on an agent of the defendant was held effective.

Service herein was a composite of methods of service approved by this Court in *Petrol Shipping*, by the Ninth Circuit in *Republic International* and by the District Court for the District of Columbia in *Renchard*. Accordingly, plaintiffs respectfully submit that service of process in this case was valid and effective.

POINT II

Defendants are subject to the *in personam* jurisdiction of this Court under State and Federal law.

A. Defendants Empire and Department are present in New York through their wholly owned and controlled agent, Iran Air, and are, therefore, subject to *in personam* jurisdiction under N.Y.C.P.L.R. § 301.

Since the case at bar does not arise out of any act done in New York, *in personam* jurisdiction pursuant to New York State law must be founded on N.Y.C.P.L.R. § 301 (McKinney 1972), *i.e.* doing business. *Beja v. Jahangiri*, 453 F.2d 959 (2d Cir. 1972). As this Court noted in *Beja*, *supra*, "[u]nder New York law . . . 'doing business' has no well-defined meaning." 453 F.2d at 961. There is no precise New York test for "doing business," *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917), but such test as exists is a "simple pragmatic one." *Bryant*

v. Finnish National Airline, 15 N.Y.2d 426, 432, 260 N.Y.S. 2d 625, 629, 208 N.E.2d 439, 441 (1965).

Until quite recently, all New York cases involving the New York "doing business" standard have involved corporations. *McLaughlin, Supplementary Practice Commentaries*, 7B N.Y.C.P.L.R. § 301 at 7 (McKinney Supp. 1976); *cf. ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 (1st Dept. 1976) [C.P.L.R. § 301 applied to an individual]. The Court should, therefore, apply the "doing business" test in this case by analogy to New York cases involving corporations. This is consistent with the observation in *Victory Transport* that the Court saw "no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." 336 F. 2d at 363.

Under New York law a parent corporation may be present through the activities of a subsidiary controlled by the parent where the acts of the subsidiary can fairly be attributed to the parent. *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967), *cert. denied* 389 U.S. 923 (1967); *Taca Inter. Air. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. denied* 390 U.S. 996 (1968); *Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd.*, 55 F.R.D. 519 (S.D.N.Y. 1972); *Tokyo Boeki (U.S.A.), Inc. v. S.S. Navarino*, 324 F.Supp. 361 (S.D.N.Y. 1971).

In this case, Iran Air is the wholly owned and wholly controlled corporate extension of the defendants (A 123). The relationship between the defendants and Iran Air is such that the airline is "in fact, if not in name" a branch or department of the defendant Empire. *Cf. Public Administrator of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 132, 278 N.Y.S.2d 378, 382, 224 N.E.2d 877, 879 (1967).

A leading New York case on the presence of a parent through its affiliate, *Frummer, supra*, involved a tort arising in England. Plaintiff brought an action against Hilton Hotels (U.K.) Ltd., which operated and controlled the hotel where he was injured, Hilton Hotels Corp. and Hilton Hotels International. Hilton Hotels (U.K.), a British corporation, moved to dismiss for lack of *in personam* jurisdiction. The Court found the defendant, Hilton Hotels (U.K.) to be doing business in New York through the activities of the Hilton Hotel Service, which had an office in New York through which hotel reservations for Hilton Hotels (U.K.) and other Hilton Hotels were made and confirmed. A primary purpose of the hotel service, a non-profit corporation commonly owned by Hilton Hotels Corp. and Hilton Hotels International, was to generate business for the London Hilton where the plaintiff was injured. The Court found the "pivotal [jurisdictional] factor" to be that "the Service does all the business which Hilton (U.K.) could do were it here by its own officials." 19 N.Y.2d 537, 281 N.Y.S.2d 44. Similarly, there is little more that the defendants Empire and Department could do to engage in international air carriage than is presently being done through their agent, Iran Air.

This Court, in *Gelfand, supra*, read *Frummer* to mean that

"a foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them the corporation's own officials would undertake to perform substantially similar services." *Gelfand, supra*, 385 F.2d at 121.

The Empire chose to engage in international commercial aviation and is so doing through its "New York representative" and agent, Iran Air. Were it not for Iran Air, the

Empire would be forced to perform through its own employees or other agents the same functions now performed by its wholly owned and wholly controlled carrier. It should be noted that *Gelfand* involved a personal injury action arising outside New York and that the defendants were found to be "doing business" through an agent of an agent and without any evidence of the defendant's either owning or controlling its "New York representative." 385 F.2d at 119.

In another leading New York "doing business" case, *Taca, supra*, the Court held Rolls Royce, Ltd. (Ltd.) a British corporation, subject to *in personam* jurisdiction through Rolls Royce, Inc. (Inc.), a Delaware corporation owned by Rolls Royce of Canada, Ltd. *Taca* involved a hull suit for the loss of an aircraft in a crash in Nicaragua. The *Taca* court looked to the relationship between Ltd. and Inc. and found that Ltd. wholly owned Inc., that Ltd. and Inc. shared common directors, that Ltd. and Inc. transferred executives between themselves and that Inc.'s net income ultimately appeared on Ltd.'s balance sheet. On these facts, the Court found Inc. to be a "mere department" of its parent, Ltd., and that Ltd. was subject to the Court's *in personam* jurisdiction through Inc.'s presence in New York. 15 N.Y.2d 102, 256 N.Y.S.2d 132.

This Court followed *Taca* in *Boryk v. deHavilland Aircraft Co.*, 341 F.2d 666 (2d Cir. 1965). *Boryk* was a wrongful death, diversity action involving an aircraft accident in Brazil. In finding deHavilland Aircraft Co., Ltd. (Ltd.), a British corporation, present in New York through its subsidiary, deHavilland Aircraft, Inc. (Inc.), a Delaware corporation, the Court noted that Ltd. owned Inc., that Ltd. and Inc. shared directors and that Ltd. made interest-free loans to Inc. The Court held that *Taca*:

"... indicates New York's steady movement towards holding, that in determining whether a corporation has

engaged in activities in the state, it is immaterial whether these are conducted through a branch or through a subsidiary corporation, even though the latter's formal independence has been scrupulously preserved." 341 F.2d at 668.

In short, *Boryk, Taca, Gelfand and Frummer* emphasize that "throughout the area of jurisdiction, the realities and not just the formalities must be dealt with." *Boryk, supra*, 341 F.2d at 669. The reality here is that the defendants do business in the forum through Iran Air.

Vicente v. State of Trinidad and Tobago, 53 A.D.2d 76, 385 N.Y.S.2d 83 (1st Dept. 1976), *rev'g. Vicente v. State of Trinidad*, 83 Misc.2d 101, 372 N.Y.S.2d 369 (Sup. Ct., N.Y. Cty. 1975), which held a foreign government not subject to *in personam* jurisdiction and which is now on appeal to the New York Court of Appeals, is inapposite. *Vicente* was a medical malpractice action arising from treatment the infant plaintiff received in the Port of Spain General Hospital, an institution owned, operated and controlled by the defendant. The lower court had found the defendant subject to *in personam* jurisdiction in New York through service by registered mail upon the Attorney General of Trinidad and Tobago and by personal delivery to the New York offices of the defendant's Mission to the United Nations, the Trinidad and Tobago Industrial Development Corporation, the Trinidad and Tobago Tourist Board and British West Indies Airlines.

Vicente is clearly distinguishable from this case. There was no relationship there between the agents of the state who were served and the cause of action. In this case, the persons killed and injured were passengers who had purchased tickets for Iran Air flights and were waiting to board these flights when the roof collapsed. Plaintiffs have amply demonstrated the relationship between Iran Air and defendants Empire and Department.

Additionally, the Appellate Division in its *per curiam* decision relied on sovereign immunity as a basis for dis-

missal even though the United States State Department had rejected the defendant's claim of sovereign immunity.⁷ Sovereign immunity is not an issue on this appeal. The refusal of the *Vicente* Court to follow the Department of State's rejection of the sovereign immunity claim is, moreover, clear error. This Court has read *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) to mean

"that the courts should deny immunity where the State Department has indicated, either directly or indirectly, that immunity need not be accorded. It makes no sense for the courts to deny a litigant his day in court and to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed." *Victory Transport, supra*, 336 F.2d at 358.

B. Defendants are subject to *in personam* jurisdiction under Federal law.

This Court has not decided whether state or federal law should determine a foreign government's amenability to suit in an action brought pursuant to 28 U.S.C. § 1332(a)(2). *Arrowsmith v. United Press International*, 320 F.2d 219, 225 (2d Cir. 1963), considered "ordinary diversity cases." Any distinction between New York and federal law in the exercise of *in personam* jurisdiction over foreign corporations pursuant to N.Y.C.P.L.R. § 301 is slight. *Beja, supra*, 453 F.2d at 961. Yet if federal law were applied, there is no question but that subjecting the defendants Empire and Department to the jurisdiction of this Court would be in accordance with the basic fairness requirements set forth in *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Insurance Co.*, 355

⁷ Accordingly, if *Vicente* has any bearing here, it is because *Vicente* illustrates that the United States State Department has recently refused to extend sovereign immunity to a foreign state for a tort which occurred within its territory. 83 Misc. 2d 102, 372 N.Y.S. 2d 369.

U.S. 220 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Plaintiffs have unquestionably shown that the defendants have "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe, supra*, 326 U.S. at 316. As opposed to the single isolated contact found sufficient to support jurisdiction in *McGee, supra*, plaintiffs have shown that the defendants through their agent Iran Air have "purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson, supra*, 357 U.S. at 253.

The application of a federal rule here is proper for the following reasons. First, it is inappropriate to have a foreign government's amenability to suit in this country depend upon state laws, which by their nature are diverse. Second, use of a federal standard would be consistent with the federal standards used to fashion methods of service on a foreign government. *Petrol Shipping Corp., supra*, 360 F.2d at 109. Additionally, federal law is used to determine the scope of the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), see, *Alfred Dunhill of London, Inc. v. Cuba*, — U.S. —, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); and to rule on the sovereign immunity claim of a government, *Victory Transport, supra*, 336 F.2d at 360. See, Miller, *Service of Process on State, Local and Foreign Governments Under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers*, 46 F.R.D. 101, 137 (1969).

POINT III

Plaintiffs' affidavit and supporting documents establish a *prima facie* basis for the exercise of *in personam* jurisdiction over defendants. Any doubt should be resolved in favor of a remand for further discovery and a hearing.

Plaintiffs submit that their detailed affidavit and exhibits establish at least a *prima facie* basis for the exercise of *in personam* jurisdiction over the defendants Empire and Department. *Alosio v. Iranian Shipping Lines, S.A.*, 307 F.Supp. 1117, 1119 (S.D. N.Y. 1970):

"[W]here it is enough for plaintiffs to show 'threshold jurisdiction' sufficient to demonstrate the fairness of allowing them to continue the suit here, *United State(s) v. Montreal Trust Co., supra*, 358 F.2d at 242-43, the affidavits amply accomplish the demonstration in their favor. This conclusion could not be reached, or [sic] course, if the problem were one of 'weighing' affidavits on the two sides containing square contradictions of each other. It can be and is reached because the sworn allegations in plaintiffs' affidavits of concrete, specific and plainly material fact are in significant respect simply ignored by the ostensibly responsive affidavits. . . . [S]triking omissions of this sort cannot be overlooked or denied their patent importance."

By contrast to plaintiffs' showing, defendants' six paragraph moving affidavit (A21-24) was, at best, "sketchy." *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583, 589 (2d Cir. 1965); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 323 (2d Cir. 1964). Defendants submitted no documents, exhibits or other affidavits to support their motion and filed no reply to plaintiffs' affidavits and exhibits in opposition. There was, moreover, no hearing or oral argument in the Court below. Under the foregoing

circumstances, the record before the Court below simply did not warrant dismissal.

While plaintiffs contend that they have established defendants' amenability to suit (see Point II), they have, at the very least, made a *prima facie* showing. Accordingly, any doubt should be resolved in favor of a remand to the Court below in order that further discovery be taken and a hearing held with respect to defendants' direct presence in New York or its presence through Iran Air and other commercial organizations and corporations in New York that have ties to the Empire of Iran (A 188). This Court has emphasized the need for a full examination of those facts relevant to issues of personal jurisdiction.

"[W]e believe that issues of personal jurisdiction are fully as deserving of thorough factual exposition as issues related to the merits of a claim, for jurisdictional decisions may also determine substantial rights." *Agrashell, supra*, 344 F.2d at 589.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the defendants' motion denied; alternatively, this case should be remanded to the Court below for further proceedings.

Respectfully submitted,

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